

**Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

<hr/>)	
<i>In re</i>)	
)	
DISTRIBUTION OF CABLE)	NO. 14-CRB-0010-CD (2010-13)
ROYALTY FUNDS)	
<hr/>)	

Written Direct Testimony of

Daniel M. Hartman

December 22, 2016

TABLE OF CONTENTS

I.	QUALIFICATIONS.....	1
II.	INTRODUCTION AND SUMMARY.....	2
III.	MVPDs AND DISTANT SIGNAL PROGRAMMING.....	3
IV.	VALUE OF SPORTS PROGRAMMING TO MVPDs.....	5

I. QUALIFICATIONS

1. I have nearly twenty years of experience in the satellite television business as an executive responsible for the valuation and acquisition of television programming, including fifteen years in that capacity at DIRECTV, the nation's largest satellite television provider. I am currently President of Hartman Media Consultants, providing consulting services for various media clients, including cable television networks, program distributors and investors in television programming distribution.

2. I started my career in October of 1989 as a corporate attorney at O'Melveny & Myers in Los Angeles, CA. In February of 1995, I accepted a position as Senior Counsel, Legal Affairs for Fox Broadcasting Company where I served as lead attorney for the Fox Sports group. I also served as legal counsel for the Fox broadcast television network.

3. In February 1998, I took a position as Assistant General Counsel, Business and Legal Affairs at DIRECTV, where I spent two years negotiating agreements for carriage of programming on DIRECTV. In April of 2000, I moved to the Programming Acquisitions department at DIRECTV and became Senior Director, serving in a strictly business role. I remained at DIRECTV until January 2013, having been promoted to Senior Vice President of Programming Acquisitions in 2007. In that capacity, I was responsible for DIRECTV's program acquisition activities with respect to all general entertainment and premium cable networks, as well as initiatives such as video-on-demand programming and the development of DIRECTV's "TV Everywhere" platform. My responsibilities included negotiating the terms of carriage for that programming. They also included overseeing sports programming negotiations as well as the strategy and negotiations with respect to local broadcast station groups.

4. During my tenure at DIRECTV, I served as a Board member of The Tennis Channel from 2007 through 2012 where my duties included providing guidance on distribution and channel strategy matters. In addition, since 2008 I have served as a Board member of the Los Angeles Sports Council and the Southern California Committee for the Olympic Games.

5. At DIRECTV I worked regularly with the CEO and other senior executives as lead strategist with respect to pricing and packaging of content as well as budgeting and forecasting of programming costs. I was closely involved in the selection of channels for DIRECTV (including distant signal programming). This selection of channels to launch (and, subsequently, whether to maintain them on the platform) involved an in-depth cost/benefit analysis. Throughout my tenure at DIRECTV, I negotiated hundreds of programming distribution agreements covering all types of content, including retransmission consent agreements for broadcast television station carriage. During the period covering 2010-2013, I also negotiated an agreement for the rights to continue receiving the satellite signal of WGN. Thus, I gained insight into the variety of programming available to multichannel video programming distributors (“MVPDs”) and the rationale for carriage. My responsibilities required me to be familiar with the types of programming being offered by DIRECTV’s competition as well as the value of, and fair market price for, that programming.

6. I have attached a copy of my resume as Appendix A.

II. INTRODUCTION AND SUMMARY

7. I understand that this proceeding involves the distribution of the compulsory licensing royalties paid by cable operators to retransmit non-network programming on distant signals during the years 2010, 2011, 2012 and 2013. I further understand that the goal in distributing these royalties among the copyright owners of the programming is to allocate the royalties so that each group of copyright owners receives, as a percentage share, what it would have received in an open market absent any compulsory license.

8. Although the technology utilized by cable and satellite distributors may differ, these distributors share similarities, particularly when it comes to the product they sell: television programming. Both satellite and cable companies compete for paying customers. Monthly subscriber fees from these customers are by far the most significant source of revenue for MVPDs, and attracting and maintaining these subscribers is necessarily the lifeblood of MVPDs. Thus, the selection of programming offered to customers is of tantamount importance to all

MVPDs, including cable and satellite. Both cable operators and satellite providers value programming in essentially the same way.

9. At the request of the Joint Sports Claimants (“JSC”), I have reviewed the report entitled “Cable Operator Valuation of Distant Signal Non-Network Programming: 2010-2013” (“Bortz Survey”) prepared by Bortz Media & Sports Group, Inc. (“Bortz Group”). The Bortz Group conducts this survey of the cable industry each year in order to determine what cable systems would have paid, on a relative basis, for the different types of non-network programming on the distant signals, had those systems been required to negotiate in an open market absent compulsory licensing. The Bortz Survey studies cable systems, and, while there are some differences between the distant signals carried under the Section 111 cable statutory license and the Section 119 satellite statutory license (discussed more fully below), the overall distant signal programming is similar. In the period covered by this proceeding, the years 2010-2013, the predominant distant signal distributed by both satellite providers and cable systems was the superstation WGN.

10. The results of the Bortz Survey show that for the period from 2010-2013, cable operators valued live professional and college team sports programming on the distant signals they carried more highly than any other distant signal non-network programming category. In my opinion, the 2010-2013 Bortz Survey results provide a reasonable estimate of the relative values cable operators and other MVPDs would assign to the various categories of non-network distant signal programming addressed in those cable operator surveys.

III. MVPDs AND DISTANT SIGNAL PROGRAMMING

11. Traditional cable television is generally delivered from a headend via coaxial or fiber-optic cables into the home. Satellite television is delivered via satellite transmission to a satellite dish (generally affixed to the rooftop of a residential dwelling) and a wired connection into that dwelling. While the infrastructure for delivery may be different, the business model for each is very similar. Both rely predominantly on subscriber fees from their customers to generate revenue. There are other sources of ancillary revenue, such as fees generated from the

lease or sale of set top boxes and revenue generated from advertising time allocated to them by channels they distribute. (Note that MVPDs are not permitted to insert or sell advertising on distant signals carried pursuant to the Section 111 or 119 statutory license.) However, subscriber fees make up the vast majority of MVPD revenues.

12. Both cable and satellite companies make secondary transmissions of out-of-market distant broadcast signals. While these signals may vary depending on whether they are licensed via Section 111 or Section 119, in 2010-13 WGN was a constant across cable and satellite distributors. WGN was by far the most widely carried distant signal by cable operators during the 2010-2013 period: approximately three-fourths of the “Form 3” cable systems that retransmitted distant signals during that period retransmitted WGN as a distant signal (available to more than 41 million subscribers). By comparison, the next most widely carried distant signals were available on a distant basis to fewer than 1.2 million subscribers. Further, WGN alone accounted for more than three-fourths of the total fees generated by signals carried on a distant basis by cable operators during the 2010-2013 period.

13. The predominance of WGN was similar on the satellite side. Based on royalty statements of account filed by satellite carriers, WGN accounted for 61% to 79% of the total Section 119 royalty fees paid by DISH during the 2010-2013 period, depending on the year. For DIRECTV that number ranged from 72% to 79%.

14. There are some differences between satellite carriers and cable systems when it comes to compulsory licensing for distant television signals. On the cable side, only non-network distant signal programming is compensable for royalty distribution purposes (all programming on Fox stations is considered non-network programming). On the satellite side, both network and non-network programming is compensable. In addition, cable systems pay statutory royalties to carry distant public television stations and Canadian television stations; satellite carriers do not.

15. Satellite distributors pay a per-subscriber statutory royalty fee to retransmit distant network and non-network signals. However, a distant network signal may be offered only in a

geographic area that is “unserved” by a local over-the-air station (or stations) affiliated with the same network. Because so many local television markets in the United States are “served” by local network stations, in 2010-13 the number of distant network satellite subscribers was much smaller than the number of distant independent signal subscribers (principally WGN). During the 2010-2013 period, approximately 23% of DIRECTV’s Section 119 royalties were paid for distribution of distant network signals (the comparable percentage for DISH was less than 3%).

16. These differences in the signals for which cable and satellite services pay, however, do not alter the fundamental fact that these services compete with each other for essentially the same universe of customers for the same product: multichannel video programming. Attracting and retaining customers is the lifeblood of the MVPD business, and the number and types of channels an MVPD offers is key to that strategy. Thus, programming deemed valuable or “must have” to a satellite provider (e.g., “tune in” programming, time-shift resistant programming, marquee programming), would be valued the same by a cable provider. Live sporting events are the prime example of this type of programming.

IV. VALUE OF SPORTS PROGRAMMING TO MVPDs

17. As set forth in Table I-1 below, the Bortz Survey found that in each of the years 2010, 2011, 2012 and 2013, cable operators valued the live professional and college team sports programming on the distant signals they carried more highly than any other distant signal non-network programming category:

Table I-1.
Distant Signal Programming Valuation Studies, 2010-13

	2010	2011	2012	2013	2010-13 Average
Live professional and college team sports	40.9%	36.4%	37.9%	37.7%	38.2%
News and public affairs programs	18.7%	18.3%	22.8%	22.7%	20.6%
Movies	15.9%	18.6%	15.3%	15.5%	16.3%
Syndicated shows, series and specials	16.0%	17.4%	13.5%	11.8%	14.7%
PBS and all other programming on non-commercial signals	4.4%	4.7%	5.1%	6.2%	5.1%
Devotional and religious programming	4.0%	4.5%	4.8%	5.0%	4.6%
All programming on Canadian signals	<u>0.1%</u>	<u>0.2%</u>	<u>0.6%</u>	<u>1.2%</u>	<u>0.5%</u>
Total*	100.0%	100.0%	100.0%	100.0%	100.0%

*Columns may not add to total due to rounding.

18. The high relative value that the Bortz Survey accords to live professional and collegiate team sports programming (approximately 38%) is consistent with my experience in the MVPD industry, including during the years 2010 through 2013.

19. As noted above, subscriber fees account for the great majority of MVPD revenue, and, thus, operators live and die by these numbers. The key to gaining and maintaining subscribers is the programming offered (along with its associated price point). The key determinant of value, then, of any particular type of programming to an MVPD is the value of such programming for purposes of maximizing subscriber growth and minimizing subscriber loss. In the ever-increasing competitive MVPD space, any edge makes a difference.

20. Sports programming is unique and, in my experience in the MVPD business, the most valuable category of programming on cable and satellite platforms. Live sports programming is a “one-of-a-kind” experience that subscribers want to watch in real time. Sports programming, unlike most other programming, is resistant to time shifting. Results from live sporting events are available from multiple sources as these events are unfolding; any delay in watching can thus spoil the results for a fan.

21. Live sports is one of the few key pieces of programming that distinguishes MVPDs from other aggregators/distributors of programming. Sports fans are incredibly passionate about their teams and will schedule their days around when a particular game is airing. MVPDs must offer this programming (and offer it live) if they are going to compete for pay television subscribers, and availability of this programming is often highlighted in marketing materials as a selling point to prospective customers. If a particular MVPD does not carry (or ceases carriage of) a channel carrying live sports, the customer reaction is quick and severe. Loss of subscribers (possibly significant) can be assured.

22. An MVPD would carry a distant signal only if the programming on that signal makes carriage worthwhile. MVPDs cannot insert advertising on a distant signal, nor can they alter the signal in other ways that they might with other channels (e.g., overlays of information,

interactive elements with revenue opportunities). Live sports programming is the most important programming to an MVPD in deciding whether to launch (and continue to carry) a distant signal. Live sports programming serves as a differentiator for distant signals, and a distant signal is much more attractive if it carries sports programming not otherwise available. A good example of this is the availability of Chicago Cubs games on WGN. Cubs fans are everywhere, and WGN's carriage of Cubs games in 2010-13 made it a "must have" for many MVPDs.

23. As noted above, WGN was the main independent distant signal distributed by DIRECTV during the years 2010-2013, accounting for approximately three quarters of DIRECTV's Section 119 royalties in those years. In 2010-13, WGN's sports programming, which included Major League Baseball telecasts of the Cubs and White Sox as well as National Basketball Association telecasts of the Chicago Bulls, was by far the most valuable programming that WGN offered to MVPDs. Because this programming is popular across the country, carrying WGN increased customer satisfaction and thereby provided great value to an MVPD's line-up. The availability of sports programming on WGN factored heavily in DIRECTV's decision to carry it as a distant signal.

24. I have reviewed the written testimony in the 2004-05 proceeding of Judith Meyka, consultant and former Senior Vice President of Programming for Adelphia Communications. JSC Ex. 11. She testified as to the importance of live sports programming to a cable operator's programming lineup. Unlike other types of programming, it is "one-of-a-kind;" you cannot substitute one game for another, one team for another or one sport for another. I agree with Ms. Meyka's testimony. Sports fans are very passionate and will not hesitate to quickly switch video providers if their particular team is not available on their current provider. MVPDs are loath to drop a channel with live sports programming knowing this. Further, a fan may choose not to subscribe to a provider's service if a particular channel carrying his or her team is not available. Hence, MVPDs generally launch a new channel carrying live sports once one of their competitors launches that channel. The competition in the MVPD space is stiff and live sports is very important to attracting and retaining subscribers.

25. Other industry executives similarly have testified in prior proceedings as to why MVPDs value sports programming so highly. I agree with those witnesses that live sports programming has great and unique value to cable operators. The cable and satellite television business has certainly changed since this testimony was given but these statements still remain true today, probably even more so. Fans are passionate about their team(s), and channels that carry these teams are the most important to a cable operator. There is no substitution for this product. On the other hand, movies and syndicated programming, because of their nature and wide availability from a variety of sources, typically do not generate the type of interest that causes customers to become or remain cable subscribers. Subscribers are less likely to switch providers if a cable operator drops a distant signal carrying non-sports programming.

26. This applies equally to the satellite side. Live sports programming is just as important to satellite distributors. In fact, DIRECTV has consistently used sports programming to differentiate itself from its competitors as a means to gain and keep subscribers.

27. The MVPD industry is incredibly competitive and has only become more so in the last decade or so. During the 2010-2013 period at issue, MVPDs were competing not only amongst themselves, but also with formidable competitors such as Netflix, Hulu, Amazon and Apple TV. Subscription television is a saturated market, and one of the very few genres of programming that make MVPDs stand out is live sports. The fact that there are many other sources of non-sports programming (e.g., movies, sitcoms, dramas) has made this type of programming increasingly fungible, and by 2010-13 the availability of such programming also had increased significantly on platforms outside of traditional MVPDs.

28. In contexts where the compulsory license does not apply, prices for live sports rights programming paid by distributors is set via marketplace negotiations. It is no secret that sports rights costs have been increasing for years. In fact, several years ago, DIRECTV began adding a “Regional Sports Fee” surcharge on its customers’ bills in certain regions of the country as a way to recoup the rising costs of sports programming on non-broadcast cable networks. Other MVPDs followed.

29. During 2010-13 the average per channel cost for channels containing sports far outweighed the average cost per channels devoted to non-sports programming. During that time period, channels containing sports programming accounted for well over 40% of programming costs to an MVPD even though a much smaller percentage of subscribers were regular watchers of such channels. MVPDs are forced to pay higher and higher fees for sports programming because they must serve their subscriber base which contains very vocal and very passionate fans. This is a testament to the power of sports.

30. During my tenure at DIRECTV, I witnessed the market in action. During the period from 2006-2013 the annual increases for channels containing sports increased at higher percentages than entertainment or other channels. A big reason for these increases is directly tied to the channels' greatly escalating costs to acquire this programming. The costs of professional and college games far outpaced the costs of general entertainment programming.

31. The power of sports can also be seen in the proliferation of sports networks coming to market in the last 15 years. Each of the professional sports leagues launched a standalone channel (e.g., NFL Network, MLB Network, NBA TV), and more than a few professional teams broke away from the channel they were broadcast on at the time to form their own channel (e.g., Yankees, Mets, Lakers). Certain college conferences have followed suit (e.g., Big 10, SEC). MVPDs were forced to carry these channels at additional (often significant) costs in order to compete. This does not happen with non-sports programming.

32. The proliferation of options for watching non-sports programming has only increased the value of live sports to an MVPD. The period covering 2010-2013 saw the launch (or continued growth) of non-traditional ways of watching content. Services like Netflix, Amazon and Hulu provide a plethora of entertainment-based programming that can easily fulfill the needs of a non-sports fan. In addition, technology allowed for viewing content on a time-shifted basis (including some viewing out-of-home). Thus, live sports became even more important to MVPDs as a way to gain/maintain their subscriber base.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 20, 2016

A handwritten signature in black ink, appearing to read 'D. Hartman', written over a horizontal line.

Daniel M. Hartman

Appendix A

DANIEL M. HARTMAN

217 21st Street, Manhattan Beach, CA 90266
310 200 6458 | dmhartman@hartman.media

EXPERIENCE

President | Hartman Media Consultants

Manhattan Beach, CA 2013-Present

Provide strategic advice to a variety of traditional and new media companies with respect to content acquisition and distribution.

Senior Vice President, Programming Acquisitions | DIRECTV, Inc.

El Segundo, CA 1998-2013

Responsible for program acquisition activities for DIRECTV with respect to all general entertainment, sports and premium networks as well as local broadcast stations. Negotiated carriage agreements for, and maintained day-to-day relationships with, all new and existing networks. Worked regularly with EVPs of Content and Marketing and CEO as lead strategist with respect to pricing and packaging of content as well as budgeting and forecasting of programming costs.

Senior Counsel, Legal Affairs | Fox Broadcasting Company/Fox Sports

Los Angeles, CA 1995-1998

Served as chief in-house counsel for Fox Sports, duties for which included negotiating and drafting documentation relating to sports rights acquisitions as well as all above-the-line personnel. Served as primary attorney for Fox Sports Marketing and Fox Sports Online. Also served as counsel for Fox Broadcasting Company, negotiating pilot/series agreements, production services agreements, content license agreements.

Corporate Attorney | O'Melveny & Myers

Los Angeles, CA 1989-1995

Drafted and negotiated documentation with respect to a variety of corporate and lending transactions.

EDUCATION

George Washington University Law Center

J.D., with honors, May 1989

Trustee Scholar

The Pennsylvania State University

B.A., with Honors, May 1985 | Communications, Business Minor

Graduate of Schreyer Honors College; Presidential Medal of Achievement Recipient

BOARDS

The Tennis Channel: 2007 - 2012

Los Angeles Sports Council/Southern California Committee for the Olympic Games:
2008-Present

Penn State College of Communications Advancement Council: 2014-Present

Certificate of Service

I hereby certify that on Monday, February 12, 2018 I provided a true and correct copy of the Daniel M. Hartman Written Direct Testimony to the following:

National Association of Broadcasters (NAB), represented by David J Ervin served via Electronic Service at dervin@crowell.com

Public Broadcasting Service (PBS), represented by Dustin Cho served via Electronic Service at dcho@cov.com

MPAA-represented Program Suppliers, represented by Alesha M Dominique served via Electronic Service at amd@msk.com

Spanish Language Producers, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

Devotional Claimants, represented by Jessica T Nyman served via Electronic Service at jessica.nyman@pillsburylaw.com

Multigroup Claimants, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

SESAC, Inc., represented by Christos P Badavas served via Electronic Service at cbadavas@sesac.com

Broadcast Music, Inc. (BMI), represented by Janet Fries served via Electronic Service at janet.fries@dbr.com

Canadian Claimants Group, represented by Lawrence K Satterfield served via Electronic Service at lksatterfield@satterfield-pllc.com

National Public Radio, Inc. (NPR), represented by Gregory A Lewis served via Electronic Service at glewis@npr.org

Signed: /s/ Michael E Kientzle